

**Before the
Commission on Common Ownership Communities
Montgomery County, Maryland**

In the Matter of:

Tina Bennett
14201 Manifest Way
North Potomac, MD 20878,
Complainant,

v.

Potomac Farms Homeowners Association,
Inc.
c/o Vanguard Management Associates,
Inc.
P.O. Box 39
Germantown, MD 20875-0039,
Respondent.

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x	Case No. 444-O
x	October 26, 1999
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DECISION AND ORDER

The above-entitled case, having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code, 1994, as amended, and the Commission, having considered the testimony and evidence of record, finds, determines and orders as follows:

Background

On March 26, 1999, Ms Tina Bennett, owner of 14201 Manifest Way, North Potomac, MD, filed a complaint with the Commission on Common Ownership Communities against the Potomac Farms Homeowners Association requesting that the Homeowners Association be estopped from requiring that a fence at the rear of Ms Bennett's property be removed and be reprimanded for failure to advise the homeowner of her rights in a dispute with the Association.

Response on behalf of the Association was submitted by counsel in a letter received by the Office of Common Ownership Communities on April 28, 1999, indicating that early in 1998 the Association had discovered that the fence at 14201 Manifest Way was installed on Homeowner Association common property and that the Association had an obligation to other homeowners to require that the fence be removed.

Inasmuch as the matter was not resolved through mediation, this dispute was presented to the Commission on Common Ownership Communities for action pursuant to Section 10B-11(e) on June 2, 1999, and the Commission accepted jurisdiction. The matter was scheduled for public hearing on August 18, 1999 and a public hearing was conducted on that date. At the conclusion of the hearing the record was closed.

Findings of Fact

1. Ms Tina Bennett bought 14201 Manifest Way, a unit covered by the Declaration of Covenants, Conditions and Restrictions of the Potomac Farms Homeowners Association, Inc., from Dr. James Jeffers and his wife, Dr. E. Kathryn Meyer, in November 1998. Drs. Jeffers and Meyer purchased the unit from the original owner, Mr. Michael Siravo, in 1994.

2. Mr. Siravo testified that he was an original owner of 14201 Manifest Way, that he contracted to purchase this unit in 1985 and settled in 1986. He further testified that not long before the birth of his first child, approximately nine years ago, he was interested in moving the fence at the rear of his property back to get the use of more space in his backyard for his then expected child to play in without needing to worry about the child. He described filing an application with the Potomac Farms Homeowners Association, which included signatures of neighbors indicating agreement to this application and a land plat that showed that the fence line would extend into the common property by seven feet. He said that he had received approval to move the fence from the Association. He indicated that he submitted the documentation to the Association and no longer has any documentation in support of this approval. Mr. Siravo's testimony was uncontradicted. Neither the Association nor the management company had any record of Mr. Siravo's application or approval but there was no indication in presented testimony that record keeping for the Association had been managed with sufficient care to mean that absence of these documents conclusively indicated that they could not have existed.

3. Dr. Jeffers testified that he and his wife were unaware that the fence in the back of the unit at 14201 Manifest Way encroached on the common property of Potomac Farms Homeowners Association until they were first notified by the Association about a month after they had signed a contract to sell the unit to Ms Bennett.

4. Drs. Jeffers and Meyer signed a contract for sale of 14201 Manifest Way with Ms Bennett on October 2, 1998.

5. By letter misdated September 23, 1998 and received by Drs.

Jeffers and Meyer on November 5, 1998, seven days before the settlement date in the sale of the unit to Ms Bennett, Potomac Farms Homeowners Association notified Drs. Jeffers and Meyer that the fence at the rear of their property had been constructed without approval and may encroach Association property, and requested that the owners submit an application for approval for the fence with a plat showing the property line or appeal to the Association Board of Directors.

6. On November 12, 1998, Drs. Jeffers and Meyer and Ms Bennett closed on the sale of 14201 Manifest Way transferring title to Ms Bennett.

7. On November 17, 1998, Drs. Jeffers and Meyer attended the regularly scheduled meeting of the Board of Directors of Potomac Farms Homeowners Association and discussed the concerns about the existence and placement of the fence. At the close of the discussion the Board indicated that they would consult with counsel.

8. By letter dated December 16, 1998, on behalf of the Potomac Farms Homeowners Association, a letter was sent to Drs. Jeffers and Meyer with a copy to Ms Bennett informing them that the Board of Directors denied their application for reconsideration of the request that the fence be moved so that it would no longer encroach on the common area and requiring that the fence be removed from the common area within 30 days of the date of the letter. No forum for appeal was described.

9. At the hearing in this matter Ms Bennett conceded that the fence at the rear of her house enclosed approximately seven feet of property which is the common property of Potomac Farms Homeowners Association, that she was not contesting the allegation of encroachment and that she was not interested in annexing the property owned in common by the Potomac Farms Homeowners Association.

10. The Association had contracted with Dewberry & Davis to survey the Bennett property and fence location. This survey was performed under the supervision of Eric V. Day. Mr. Day testified and indicated that the fence along the rear of this property is approximately seven feet outside of the property line for 14201 Manifest Way.

11. There was no testimony indicating hardship or damage to the Association by the continued exclusive use of this strip except that a neighbor had applied to move their rear fence to extend their backyard in a similar manner.

12. The property descriptions, deeds and plat maps in the land records and otherwise available to the owners of this unit are sufficient to inform a reasonably prudent person that the fence is

outside the property line.

Discussion

The argument presented on behalf of Potomac Farms Homeowners Association was that the fence and exclusive use of the seven foot strip of common property which is enclosed has not continued for twenty years, which is the period necessary under the statute of limitations set forth in section 5-103 of the Courts and Judicial Proceedings Article of Maryland Code establishing the statute of limitations on an adverse possession action. Consequently, the enclosure and exclusive use of this strip by the owners of 14201 Manifest Way could not yet have effectively changed the ownership of this strip. The Association appears to have considered this to be an action against a continuing trespass and indicated that it was the duty of the Board of Directors to reassert common ownership. Further, it was argued on behalf of the Association that if Mr. Siravo had received approval of the Association to enclose this property, the authority of the Association to grant exclusive use of common property under Article VIII, Section 7(c) of the Declaration, is limited and extends only to grant such use on a temporary basis. "Temporary" is not among the terms defined in Article I, Section 1 of the Declaration.

Conclusions of Law

The Panel found Mr. Siravo's testimony that he had applied for and received approval to move his rear fence back seven feet from his property line and to enclose that common property to the exclusive use of the owner of that unit to be credible even in the absence of documentation. Additionally, Ms Bennett has indicated that she does not assert an exclusive ownership interest in the strip of commonly owned property currently enclosed within her fence. Thus, the use of this strip by the owners of 14201 Manifest Way, to the exclusion of the other common owners, is based on consent and is not inconsistent with the property rights of the Association or the owners who are members of the Association. As such, it does not lead to adverse possession which is inconsistent with permissive use.

Instead, Ms Bennett, and her two predecessors in interest, have a license to exclusive use of this seven foot strip but not to the detriment of the common ownership of this property.

Order

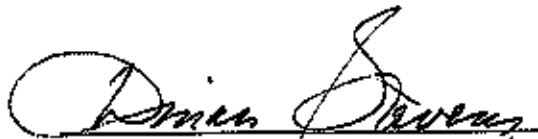
Ms Bennett has the continuing right to a fence enclosing seven feet of common property and a license to the exclusive use of that

common property which was granted to her predecessor in interest, Mr. Siravo, for the duration of the remaining reasonable life of the fence constructed by Mr. Siravo. That is the period during which the fence remains structurally sound and erect without external support and without major repairs, but not to exceed ten years from the date of this decision. At such time as the condition of the fence no longer meets this test, for any reason, or at the expiration of this period, the license to the exclusive use of this common property and the right to a fence on the common property by the owner of this unit terminates.

The Potomac Farms Homeowners Association is ordered to file this decision with the land records of Montgomery County, Maryland, and within 45 days of the date of this decision provide evidence to the Commission on Common Ownership Communities of having done so.

The foregoing was concurred in by panel members Price, Skobel and Stevens.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within thirty (30) days from the date of this Order pursuant to the Maryland Rules of Procedure governing administrative appeals.



Dinah Stevens, Panel Chairwoman
Commission on Common Ownership
Communities